IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-443

KARIN S. QUAM, individually and as Prospective Executrix of the Estate of HOWARD QUAM, deceased,

Petitioner,

v.

MOBIL OIL CORPORATION,
PERTH AMBOY DRY DOCK CO.,
INTERSTATE INDUSTRIAL PROTECTION, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Of Counsel:
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Petitioner, Karin S. Quam, widow of a seaman, Howard Quam, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 17, 1979, rehearing denied, July 16, 1979, which affirmed a judgment of the United States District Court for the Southern District of New York (Sweet, J.), entered upon the granting of a motion to dismiss at the end of Plaintiff's case, before a jury, for failure to establish a prima facie case under the Jones Act.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit appears as Appendix A to this petition. It was filed on May 23, 1979 and a petition for a rehearing was denied and filed on July 16, 1979.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254. This petition for a Writ of Certiorari is filed within 90 days of the entry of the judgment of the United States Court of Appeals for the Second Circuit.

Questions Presented

1. In a Jones Act case, where a seaman drowned while returning to his ship in an area where the Court immediately below found "some unsafe conditions to exist in and

about the dock, gangplank and barge", all of which the seaman must negotiate to reach his ship, is it necessary for his widow, where there were no witnesses, to point out the exact spot where he fell into the water and direct evidence of causation in order to entitle her to go to the jury on the issues of negligence and proximate cause?

1(a). The ship's duty to a seaman going ashore for his own purposes extends to the dock and through the dock area until he is safely ashore, or safely aboard as the case may be. When he does so, he is deemed to be "in the course of his employment."

2. The Court of Appeals has decided a federal question involving the right to a trial by jury as provided in the Jones Act, 46 U.S.C.A. 688 and the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq., contrary to the decisions of this court and all Courts of Appeal that have dealt with the question.

3. The Court of Appeals has misconceived the meaning of the three Supreme Court decisions upon which it relied. This Court can and should grant certiorari to clarify an important statutory interpretation that all other circuits have steadfastly followed.

4. By misconstruing the long standing decisions of this Court in the three cases it relies upon, the Circuit Court has deprived this plaintiff of her right to a trial by jury as given her by the Jones Act, 46 U.S.C.A. 688.

Statutes Involved

The Jones Act, 41 Stat. 1007, 46 U.S.C. 688 (1920), Recovery for injury to or death of seamen. Appendix B.

The Federal Employers Liability Act, 45 U.S.C.A., Sec. 51, et seq. Appendix C.

Statement of Facts

Plaintiff's husband was an Engineer on the M/V MOBIL CHICAGO belonging to defendant Mobil Oil Corporation for whom he had worked for 25 years, which was moored at the Perth Amboy Dry Dock Company in New Jersey on May 3, 1976. According to the testimony of Mrs. Quam, her husband called her that evening from a telephone booth on shore and told her he was going to return to the ship to watch television. His body was found the next day off Staten Island some distance from the dock where the ship was moored. The cause of death was "asphyxia by drowning".

Ingress and egress between ship and shore was provided by the ship's gangway to a crane barge and across the barge to another gangway that led to the dock. There were no handrails or ropes of any kind across the barge to which a person might hold on to nor was there a railing of any kind around the dock itself. As there was a six foot rise and fall of tide, this second gangway was hinged in such fashion as to tip one way or another with the tide. There were no handrails or ropes across the barge or around any part of the dock nor was anyone present on dock, barge or ship to witness what occurred.

Plaintiff sued Mobil Oil Corporation, the owner of the vessel, under the Jones Act, 46 U.S.C. 688, and in admiralty. Mobil impleaded the dock owner, Perth Amboy Dry Dock Co., and Perth Amboy impleaded its security guard service, Interstate Industrial Protection, Inc. Plaintiff was later permitted to amend her complaint to assert claims directly against Perth Amboy and Interstate.

Point I

Certiorari is not here sought to "review evidence and discuss specific facts." Mr. Justice Holmes in *U. S.* v. *Johnston*, 268 U.S. 220, 227, 69 L.Ed. 925, 926, 45 Sup. Ct. 496 (1925), and cited by Mr. Justice Frankfurter in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 559 (No. 28) (1957). As both courts below found a dangerous condition to exist, i.e., the District Court,

> ". . . The mere fact that *these places were in a dangerous condition* is insufficient to infer that such was a substantial factor in the cause of the injury."
>
> (Emphasis ours)

and the Court of Appeals,

> ". . . Although the defendants may have permitted *some unsafe conditions* to exist in and about the dock, gangplank and barge . . ."
>
> (Emphasis ours)

there is no need for this Court to review evidence or discuss the facts. If a dangerous condition, "even the slightest", existed in the area this seaman must traverse to reach his ship, then it is the function of the jury to determine negligence and proximate cause, not the trial court.

In *Schulz* v. *Pennsylvania R. Co.*, 350 U.S. 523, 76 Sup.Ct. 608, 100 L. Ed. 668 (1956), this Court quoted the Circuit Court below, p. 524, saying that plaintiff ". . . failed to show 'where the accident occurred' or 'that it was proximately caused by any default on the part of the defendant'." This Court rejected this reasoning in the following words, p. 526,

> ". . . But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair belief, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

Schulz v. *Pennsylvania R. Co.* has been followed by every Court of Appeals that has dealt with the question until the case at bar arose. The instant case is stronger, with both Courts below actually finding a dangerous condition to exist. This constitutes a clear conflict between the Second and all other Circuits at a time when no doubt of the wisdom of that decision was thought to exist.

In a fairly recent case in the Ninth Circuit, *Admiral Towing Company* v. *Woolen*, 290 F.2nd 641 (1961), tried to the Court and not to a jury, *Schulz* v. *Pennsylvania R. Co.*, the Jones Act and Federal Employers' Liability Act were, we submit, clearly and exhaustively examined on the principal point in the case at bar, namely, when a man has lost his life and unsafe conditions have been found to exist by the Court below (in the instant case, both Courts below), "however slight", is it necessary for the plaintiff, where there were no witnesses, to point out "where", "when", "how" and "why" the seaman met his death before the trier of the facts can be permitted to determine negligence and proximate cause? This court said no. As the case was so well researched and is so frequently cited with approval in other circuits, we quote liberally from it.

Page 649:

"However, in wrongful death actions sounding in negligence under the Jones Act, 46 U.S.C.A. 688, the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq. (adopted by reference and made part of the Jones Act), and the Death on the High Seas Act, 46 U.S.C.A. 761, or sounding in unseaworthiness under general maritime law, when the exact circumstances of the casualty are unknown, the United States Supreme Court has fundamentally transformed traditional negligence law respecting causation by permitting the finder of fact to supply by inference many of the elements normally required to be proven by the plaintiff or claimant.

Thus, an accident may be inferred from the fact of disappearance; and the 'where' and 'when' of the accident need not be fixed exactly. Schulz v. Pennsylvania R. Co., 1956, 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 688; Roth v. Bird, 5 Cir., 1956, 239 F.2d 257; Lavender v. Kurn, 1946, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916; Butler v. Whiteman, 1958, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed. 2d 754, reversing Harris v. Whiteman, 5 Cir., 1957, 243 F.2d 563; McDonough v. Buckeye S. S. Co., D.C.N.D. Ohio 1951, 103 F. Supp. 473, affirmed 6 Cir. 1952, 200 F.2d 558, certiorari denied 1953, 345 U.S. 926, 73 S.Ct. 785, 97 L.Ed. 1357; Stinson v. Atlantic Coast Line R. Co., 1957, 355 U.S. 62, 78 S.Ct. 136, 2 L.Ed. 2d 93, reversing 264 Ala. 522, 88 So.2d 189 and 266 All. 244, 96 So.2d 305; and Gaymon v. Quinn Menhaden Fisheries of Texas, Inc., Fla. App. 1960, 118 So.2d 42.

As to 'how' or 'why' the accident occurred, considerable 'speculation' is permitted. The trier of fact must be afforded substantial latitude in making this determination even though the evidence supporting it is slight and even though the reviewing court might

have arrived at a different conclusion. Schulz v. Pennsylvania R. Co., supra; Sadler v. Pennsylvania R. Co., 4 Cir., 1947, 159 F.2d 784; Johnson v. United States, 1948, 333 U.S. 46, 68 S.Ct. 391, 92 L.Ed. 468; Conner v. Butler, 1959, 361 U.S. 29, 80 S.Ct. 21, 4 L.Ed. 2d 10, reversing Fla. App. 1959, 109 So.2d 183.

As to the defendant's negligence constituting the legal cause of the accident, 'slight evidence' is sufficient so long as the inference is that which reasonable, prudent men might reach on the basis of the evidence. By use of an extension of the 'res ipsa loquitur' principle regarding 'permissible inferences from unexplained events' the finder of facts may infer the requisite legal causation, Schulz v. Pennsylvania R. Co., supra; Roth v. Bird, supra; see Sadler v. Pennsylvania R. Co., supra; Lavender v. Kurn, supra; Butler v. Whiteman, supra: McDonough v. Buckeye S. S. Co., supra; Stinson v. Atlantic Coast Line R. Co., supra; and Conner v. Butler, supra.

The test is simply 'whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury. It does not matter that, from the evidence, the (finder of fact) may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.' Rogers v. Missouri Pacific R. Co., 1957, 352 U.S. 500, 506, 77 S.Ct. 443, 448. 1 L.Ed.2d 493, quoted in Gaymon v. Quinn Menhaden Fisheries of Texas, Inc., supra, 118 So.2d at page 45, the latter possessing many points of similarity with the instant case.

In Jones Act and admiralty litigation Roth and Schulz are the landmark cases with respect to causation."

And on Page 651:

"In Schulz v. Pennsylvania R. Co., 1956, 350 U.S.

523, 76 S.Ct. 608, 100 L.Ed. 668, plaintiff's decedent was a tugboat fireman who was assigned to watch four tugs tied up at a Jersey City, New Jersey pier on Christmas night, 1959. He reported for work in the early evening, started on his duties, and was never again seen alive. His body was found a week later in the river near an adjacent pier. A flashlight was clutched in his hand.

His widow sued under the Jones Act for negligent failure of defendant to provide him with a safe place to work. The District Court directed a verdict for defendant, stating 'There is some evidence of negligence, and there is an accidental death. But there is not a shred of evidence connecting the two.'

The Court of Appeals affirmed, saying that while the evidence was 'perhaps at most only doubtfully sufficient to present a jury question as to defendant's breach of duty', it failed to show 'how or where the accident occurred' or 'that it was proximately caused by any default on the part of the defendant'. 2 Cir., 1955, 222 F.2d 540, 541.

The Supreme Court, reversing, held that the jury could have found that the tugs were insufficiently lighted, that there was some ice on the tugs, that a shortage of manpower required the decedent to handle four tugs by himself, and that he had to step from one boat to another with only a flashlight to provide illumination.

In spite of eloquent and insistent statements by the trial and appellate courts that the requisite legal cause was lacking because decedent might have fallen on a particular spot where there was no ice or which was partially illuminated by shore lights (in short, because the actual circumstances of the accident were unknown), nevertheless the Court held that the jury could find both negligence and legal causation.

The ratio decidendi of the Court's decision was not

concerned with whether the decedent was engaged in the performance of his duties when he met his death, nor the concession that his demise was not due to alcohol, foul play or suicide; it dwelt on the right of the finder of fact to draw the inference that the defendant's negligence was the legal cause of the death of one of its employees working under dangerous conditions when no facts of the 'how', 'why', 'when' or 'where' of the accident were available."

Point I(a)

In the second paragraph of its opinion, the Court of Appeals stated,

> "Finally, the judge ruled that Mobil's duty extended only as far as the dock, but that even if the ship's duty extended further, plaintiff had also failed to prove proximate cause with respect to Mobil."

As this statement is in error and as the Court of Appeals apparently supported it, we believe the point should be replied to.

What constitutes "in the course of his employment" with reference to seamen was dealt with in the relatively early (Jones Act) case of *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 63 S. Ct. 488, 87 L. Ed. 596 (1943). The question was completely covered and laid to rest by *Braen* v. *Pfeifer Oil Transportation Co.*, 361 U.S. 129, 4 L.Ed. 2d 191, 80 S.Ct. 247 (1959). Here the Court equated "in the course of employment" cases with the large body of "in the service of the ship" cases that were not brought under the Jones Act but involved maintenance and cure, citing *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, 87 L.Ed. 1107, 63 S.Ct. 930 (1943), a case which researched the entire body of law upon the subject. That case held that a seaman was "in the service of his ship" from the ship to the

public streets and return to his ship, hence, here, under *Braen* v. *Pfeifer,* Mr. Quam was "in the course of his employment" when he went ashore after dinner.

Point II

The other two cases cited by the Court below were two of four companion cases, decided together, which dealt with the Jones Act and the Federal Employers Liability Act, *Ferguson* v. *Moore-McCormack Lines, Inc.,* 352 U.S. 521, 523 (1957), and *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U.S. 500, 506 (1957). All four cases dealt with the same question, how much evidence of negligence or a dangerous condition is needed to send a case to the jury, tried under either of these statutes? This Court said in *Rogers,* p. 506,

> "Under this statute (Federal Employers' Liability Act), *the test of a jury case* is simply whether the proofs justify with reason the conclusion *that employer negligence played any part, even the slightest,* in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.
>
> Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played *any part at all* in the injury or death. Judges are to fix their sights primarily to make that appraisal and, *if that test is met, are bound to find that a case for the jury is made out* whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part'* (Emphasis of the Court) to its negligence.

> The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether *negligence of the employer played any part, however small,* in the injury or death which is the subject of the suit. The burden of the employee is met and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial from which the jury may with reason make that inference."

And on p. 509,

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and *to prevent its erosion by narrow and niggardly construction.* Similarly, once certiorari is granted, the fact that the case arises under the Federal Employers' Liability Act cannot in any wise justify a failure on our part to afford the litigants the same measure of review on the merits as in every other case."
>
> (Emphasis supplied)

After finding "some unsafe conditions to exist" in the area the seaman must traverse to reach his ship, it no longer becomes the prerogative of the Court to deprive the jury of the opportunity to perform its duty. The questions of negligence and causation are for the triers of the facts, not the Court.

The statement in the opinion of the Court below that "There was simply no evidence of causation." is very similar to the statement of that same Court in *Ferguson,* 228 F.2d, 893 (1955), that there was ". . . no proof of fault on the part of the shipowner . . ." Again, *that is for the jury to determine upon a finding of "unsafe conditions"* as this Court held.

Point III

The evident misconception of the Court of Appeals as to the meaning of *Schulz* v. *Pennsylvania R. Co., Rogers* v. *Missouri Pacific R. Co.* and *Ferguson* v. *Moore-McCormack Lines, Inc., supra,* can only lead to mischief and misunderstanding. These are landmark cases in an important area of the law, affecting every seaman and every railroad worker, or their next of kin, that must come before the federal courts for redress of their misfortunes on the job. Only the intervention of this court can prevent that from happening.

It is not possible to reconcile the result reached by the Court below with any of the three Supreme Court cases cited in the opinion. The result reached there is also directly contrary to the large body of railroad cases, the statutory authority for which was embodied in the Jones Act itself, ". . . and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable . . ." 46 U.S.C. Sec. 688.

Because of the nature of their work, vessels are frequently docked at berths that are dangerous for seamen to negotiate, either to go ashore or return to their ship. This Court long ago held that seamen were entitled to go ashore and that they must be given safe ingress and egress to do so. Both Courts below found that such safe passage was not given here, "Although the defendants may have permitted some unsafe conditions to exist in and about the dock, gangplank and barge . . . ". The attempts of both Courts below to distinguish *Schulz* v. *Pennsylvania Railroad Co.,* 350 U.S. 523 (1956), are on details only. The essential points are the same, i.e., the area was a dangerous one, no one saw the accident happen and the bodies were recovered a distance from where the men were last known to be. In tidal waters, one expects that.

There is sound reason behind these Siamese statutes. Both seamen and railroad workers are engaged in hazardous occupations. There is a certain amount of danger and risk in where they work and what they do. To reduce these hazards and compensate them or their families when injury or death take place, Congress enacted statutes to protect these men when there was some negligence on the part of the employer or both employer and employee. The Congress went further and provided that the trier of the facts would be a jury where the plaintiff requested it, a necessary congressional act to avoid the ancient rule of no juries in Admiralty. Inevitably, the ultimate question arose of how much negligence was required to take the case to the jury on the question of negligence. This court granted certiorari in *Rogers,* p. 501 ". . . to consider the question of whether the decision invaded the jury's function." The answer to that question was made clear in the words, ". . . even the slightest . . ." p. 506.

Railroad cases under the Federal Employer's Liability Act are legion in number and steadfastly adhere to the rule

that where there is any negligence on the part of the defendant, however slight, proximate cause is a question for the jury, not the Court. In *Rogers,* the Supreme Court of Missouri deviated from that rule, certiorari was granted and in an exhaustive set of opinions this Court made it crystal clear, one would have thought, that where "employer negligence played any part, even the slightest, in producing the injury or death", it has met the test of a jury case. As both Courts below in the instant case found unsafe or dangerous conditions to exist, this rule was not adhered to.

Point IV

By a misunderstanding of the three cases relied upon, the Court of Appeals has deprived this plaintiff of her right to a trial by jury given her by the statute.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

WILBUR E. DOW, JR.
Counsel for Petitioner
Pine Point
Lake George N.Y. 12845

Of Counsel:
R. LEE DOW

APPENDIX A

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 753—August Term 1978

Argued April 23, 1979 Decided May 23, 1979

Docket No. 78-7393

KARIN S. QUAM, individually and as Prospective Executrix of the Estate of HOWARD QUAM, deceased,

Plaintiff-Appellant,

—against—

MOBIL OIL CORPORATION,

Defendant-Appellee and
Third-Party Plaintiff-Appellee,

—against—

PERTH AMBOY DRY DOCK CO.,

Third-Party Defendant-Appellee,

—against—

INTERSTATE INDUSTRIAL PROTECTION, INC.,

Fourth-Party Defendant-Appellee.

Before: WATERMAN, FEINBERG and MANSFIELD,
Circuit Judges.

Appeal from judgment of United States District Court for the Southern District of New York, Robert W. Sweet, J., dismissing complaint in action for wrongful death based, inter alia, on the Jones Act, 46 U.S.C. § 688, for failure to make out a prima facie case.

Judgment affirmed.

WILBUR E. DOW, JR., New York, N. Y., for Plaintiff-Appellant.

JOSEPH E. DONAT, New York, N. Y. (Bigham, Englar, Jones & Houston, New York, N. Y., William P. Kardaras, of Counsel), for Defendant-Appellee and Third-Party Plaintiff-Appellee, Mobil Oil Corporation.

STANLEY W. ZAWACKI, New York, N. Y. (Vincent, Berg, Russo, Marcigliano & Zawacki, New York, N. Y., of Counsel), for Third-Party Defendant-Appellee, Perth Amboy Dry Dock Co.

THOMAS MCCAFFREY, New York, N. Y. (Healy & McCaffrey, New York, N. Y., of Counsel), for Fourth-Party Defendant-Appellee, Interstate Industrial Protection, Inc.

PER CURIAM

Karin S. Quam appeals from a judgment of the United States District Court for the Southern District of New York, Robert W. Sweet, J., dismissing her complaint for the wrongful death of her husband, Howard Quam. Plaintiff's husband was an Engineer on the M/V Mobil Chicago,

which was moored at the Perth Amboy Dry Dock Co. in New Jersey on May 3, 1976. According to the testimony of Mrs. Quam, her husband called her that evening from a telephone booth on shore and told her he was going to return to the ship to watch television. His body was found the next day off Staten Island some distance from the dock where the ship was moored. The cause of death was "asphyxia by drowning." There was testimony that access to the ship consisted of a gangway from the pier to a crane barge, which was the property of the docking company, and from the crane barge to the ship. Plaintiff sued Mobil Oil Corporation, the owner of the vessel, under the Jones Act, 46 U.S.C. § 688, and in admiralty. Mobil impleaded the dock owner, Perth Amboy Dry Dock Co., and Perth Amboy impleaded its security guard service, Interstate Industrial Protection, Inc. Plaintiff was later permitted to amend her complaint to assert claims directly against Perth Amboy and Interstate.

The case was tried before Judge Sweet and a jury in July 1978. After plaintiff rested, all defendants moved under Fed.R.Civ.P. 50 for a directed verdict on the ground that plaintiff had failed to make out a prima facie case. The judge granted the motion as to all defendants. With regard to Interstate, the judge found that there was no evidence of any duty of Interstate to plaintiff's decedent and, a fortiori, there was no evidence of any breach of any such duty. With regard to Perth Amboy, the court found that plaintiff did have an action in admiralty against Perth Amboy for any accident occurring on the crane barge or its gangplanks, and that there was enough evidence for a jury to find that Perth Amboy had been negligent. The judge held, however, that there was no evidence that the alleged negligence proximately caused Mr. Quam's death. Finally, the judge ruled that Mobil's duty extended only as far as the dock, but that even if the ship's duty ex-

tended further, plaintiff had also failed to prove proximate cause with respect to Mobil.

We affirm the decision of the district court. Although the defendants may have permitted some unsafe conditions to exist in and about the dock, gangplank and barge, a jury on this record could not reasonably infer that such conditions "played any part, even the slightest, in producing the . . . death for which damages are sought," which is essential to recovery. See Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 506 (1957); Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 523 (1957) (plurality opinion). There was simply no evidence of causation. In contrast, in each of the cases relied upon by appellant there were circumstances from which one might reasonably infer that the dangerous condition was at least a cause in part of the death. For example, in Schulz v. Pennsylvania Railroad Co., 350 U.S. 523 (1956), the deceased's partially unclad body, flashlight in hand, was found in the water near a pier adjacent to the inadequately lighted tugs with "some ice" on their decks where he was required to work as part of his duties. The clothes missing from his body were found in his room on the tug. From these and other circumstances, it could be inferred that he slipped on an icy deck on the cold winter's night, fell overboard and drowned. Also, it was conceded that Schulz's death was not due to other causes, e.g., foul play or intoxication. Here, there are simply not enough circumstances to warrant such an inference, and there is no similar concession ruling out other causes of death.

Judgment affirmed.

Decision of Court of Appeals Denying Petition For Reargument.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of July, one thousand nine hundred and seventy-nine.

Present: Hon. Sterry R. Waterman
Hon. Wilfred Feinberg
Hon. Walter R. Mansfield

Circuit Judges

Docket No. 78-7393

KARIN S. QUAM, individually and as prospective executrix of the estate of HOWARD QUAM, deceased,

Plaintiff-Appellant,

v.

MOBIL OIL CORPORATION,

Defendant & Third Party Plaintiff-Appellee,

v.

PERTH AMBOY DRY DOCK CO.,

Third Party Defendant & 4th Party Plaintiff-Appellee,

v.

Decision of Court of Appeals Denying Petition For Reargument.

INTERSTATE INDUSTRIAL PROTECTION CO., INC.,

Fourth-Party Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant Karin S. Quam

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. Daniel Fusaro,
Clerk
Sara Piovia

APPENDIX B

Opinion by Robert W. Sweet, D.J. (pp. 176a-188a).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 3035
(RWS)

KARIN S. QUAM, individually and as Prospective Executrix of the Estate of HOWARD QUAM, deceased,

Plaintiff,

against

MOBIL OIL CORPORATION,

Defendant
and
Third-Party Plaintiff,

against

PERTH AMBOY DRY DOCK CO.,

Third-Party Defendant
and
Third-Party Plaintiff
against

INTERSTATE INDUSTRIAL PROTECTION, INC.,

Fourth-Party Defendant.

New York, N. Y.
July 24, 1978—10 a.m.

Appendix B—Opinion by Robert W. Sweet, D.J.
(pp. 176a-188a).

Before: Hon. Robert W. Sweet, District Judge and a Jury

Appearances:

Wilbur E. Dow, Jr., Esq.
Attorney for Plaintiff

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Attorneys for Mobil Oil Corporation

By: William P. Kardaras, Esq.

Vincent, Berg, Russo, Marcigliano & Zawacki, Esqs.
Attorneys for Perth Amboy Dry Dock Co.

By: Stanley W. Zawacki, Esq.

Healey, Stonebridge & McCaffrey, Esqs.
Attorneys for Interstate Industrial Protection, Inc.

By: Thomas McCaffrey, Esq.

(Jury not present)

The Court: The history of the pleadings and claims of the plaintiff, widow of the deceased seaman, first assistant engineer of the Mobil Chicago, is as follows. The plaintiff sued Mobil Oil Corporation, owner of Mobil Chicago, pursuant to the Jones Act and in admiralty. Mobil then impleaded the dock, Perth Amboy Dock Co., asserting admiralty jurisdiction based upon a maritime contract. Perth then impleaded Interstate Industrial Protection Co. Inc., its security guard service, seeking indemnity for any liability it had to Mobil. At the close of discovery, Mobil made a motion to amend the complaint to allege an admiralty claim against Perth Amboy and Interstate on behalf of the plaintiff pursuant to Rule 14(c) of the Federal Rules of Civil Procedure. Such motion was joined in by the

Appendix B—Opinion by Robert W. Sweet, D.J.
(pp. 176a-188a).

plaintiff in the pre-trial order and was granted by this Court on the eve of trial.

The plaintiff's evidence, in the light most favorable to the plaintiff, has established that Mr. Quam, plaintiff's husband, was employed by Mobil on the ship; that the ship was at the Perth Amboy dockyard on May 3, 1976; that on that date Quam went ashore and made two phone calls to his wife, one at 5:50 p.m. and a second at approximately 7:30 p.m.; that he told his wife he was returning to the ship; that his body was found the following day in the water some distance from the location of the dock where his ship was moored; and that his wrist watch and wallet were found in his room on board the vessel. Mrs. Quam testified that her husband customarily wore his watch even at work. The plaintiff also introduced photographs of the pier taken approximately a year and five months after the accident, as well as testimony by the yard supervisor of defendant Perth Amboy that the conditions a year ago were similar to those in 1976. Based on those photographs and his September 1977 visit, plaintiff's expert testified as to certain unsafe conditions on the pier, and the crane barge situated in the water, to which Mobil was moored at the time of the accident. There was testimony that access to the ship consisted of a gangway from the pier to the crane barge which was the dock's property and from the crane barge to the ship.

Motions to dismiss have been made on behalf of all the defendants. I will treat each claim against each defendant separately.

As to the plaintiff's claim against Interstate:

Plaintiff's evidence makes no reference whatsoever to Interstate. Plaintiff has failed to establish any duty on the part of Interstate vis-a-vis the plaintiff or the breach of any duty to the plaintiff. Therefore, plaintiff's admiralty claim directed against Interstate must be dismised.

As to the plaintiff's claim against Perth Amboy:

Plaintiff by the amended complaint has a claim in admiralty against Perth Amboy. Perth Amboy is the owner of both the dock and the crane barge. The claim differs depending upon the place where the alleged accident occurred.

The Dock. There is no cause of action in admiralty with respect to any accident alleged to have occurred on the dock, since any injury resulting from the condition of the dock is deemed to have occurred on land, and in that I rely upon *Wiper* v. *Great Lakes Engineering,* which counsel have cited. Therefore, the admiralty claim by the plaintiff against Perth Amboy with respect to the dock must be dismissed.

However, on my own motion I will conform the pleadings to the evidence pursuant to Rule 15(b) of the Federal Rules of Civil Procedure. Therefore, as to the dock, plaintiff has sufficiently alleged a common law negligence action, based upon state law, against Perth Amboy. Under the principles of the pendent jurisdiction this action is within the jurisdictional province of this court. Such cause of action is treated in all respects as if it had been raised in the pleadings; therefore it is considered to relate back to the original claim against Perth Amboy. However, the original claim against Perth Amboy by the plaintiff was not made until June 26, 1978, upon motion of defendant Mobil Oil to amend the complaint. It is the opinion of this Court that, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, the amended complaint related back to the original pleadings in this action. Therefore, the common law negligence claim also relates back to the original pleadings and is not time-barred by the statute of limitations, as urged by Perth Amboy.

The barge. Plaintiff has a claim in admiralty against Perth Amboy for any accident alleged to have occurred on

the crane barge or its gangplanks. This negligence claim is in admiralty, since the barge and the gangplanks were in or floating on navigable water.

Although plaintiff has these claims against Perth Amboy, for the reasons set forth below, both must be dismissed from this action.

The plaintiff has the burden of proving her case. From the facts considered in the light most favorable to the plaintiff, there is sufficient evidence for the jury to conclude that Perth Amboy was negligent. However, assuming for the purpose of this motion that negligent conditions existed, there is no evidence upon which the jury could conclude that such negligence was the proximate cause of the injury.

Mr. Quam's body was not found where the plaintiff alleges the accident occurred. Mrs. Quam testified that during her telephone conversation with Mr. Quam he stated he was returning to the ship. There is no direct evidence that Mr. Quam actually did return to the ship. Even assuming he did head back to the ship, there is no evidence that Mr. Quam fell from Perth Amboy's docks, gangplanks, or crane barge. There is no evidence before this Court, other than that with respect to Mr. Quam's watch and wallet, with which I will deal in a moment, that Mr. Quam even made it as far as Perth Amboy's dockyard at the pier.

Furthermore, if there was sufficient evidence for the jury to conclude that Mr. Quam fell from the dock, gangplank or barge, plaintiff has made no showing that any act or omission of Perth Amboy played a substantial part in bringing about the fall. The mere fact that these places were in a dangerous condition is insufficient to infer that such was a substantial factor in the cause of the injury.

Therefore, to find Perth Amboy liable the jury would have to speculate that Mr. Quam headed back to the ship,

that he fell from the dock, gangplank or barge, and that such fall was substantially caused by some negligent condition thereon. The evidence here presents no more than a choice of probabilities upon which the jury would be speculating. Such speculation will not be permitted. And in that regard I rely upon *Armstrong* v. *Commerce Tankers.*

Now, with respect to the watch and the wallet, plaintiff's testimony that Mr. Quam never goes out without his watch and wallet could be said to raise an inference that he returned to the ship. This inference would necessitate a finding that Mr. Quam made it back to the ship. There would be no liability on the part of Perth Amboy for anything occurring on the ship. To assume that Mr. Quam returned to the ship, dropped off his wallet and watch, and then left again would be engaging in speculation far beyond that which will be allowed by this Court.

Based on the foregoing, the claims against Perth Amboy must be dismissed.

As to the plaintiff's claim against Mobil:

Plaintiff has an admiralty claim for unseaworthiness and a Jones Act claim for negligence against Mobil. Since Mr. Quam was off the ship for his own purposes and not during the course of his employment, the ship's duty to him would extend only as far as the dock. *Wheeler* v. *West India S.S. Co.,* and *Dangovich* v. *Isthmian Lines, Inc.* However, even if the duty of Mobil extended on to the dock, for the reasons set forth above there is insufficient evidence upon which the jury could conclude that Mr. Quam fell from the dock, gangplanks or barge. For the purpose of this analysis, however, it is assumed that the ship's duty did extend to the gangway, to the crane barge, the passage over the crane barge, and the gangway to the dock, and that the plaintiff has introduced evidence from which the jury

could conclude that there was negligence in the failure to have handholds on the barge.

Based upon the testimony with respect to Mr. Quam's wallet and watch, there may have been sufficient evidence for the jury to conclude that Mr. Quam returned to the ship and was on the ship when he fell. However, plaintiff has set forth no facts establishing an unseaworthy or negligent condition of the ship itself. Furthermore, even assuming the jury could find that plaintiff was on the gangplanks or the barge when he fell, there is no evidence to establish that such fall was in any way caused by the negligence of Mobil. The Jones Act standard of causation, which this Court must apply with respect to Mobil, requires that whenever it appears, from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about the injury the plaintiff is entitled to recover. For the jury to find that any alleged negligent condition of the barge or gangplanks contributed to Mr. Quam's fall, it would have to engage in speculation and conjecture. The mere fact that an accident happened, standing alone, does not permit the jury to draw an inference that the accident was in any way caused by negligence. *Black* v. *Penn Central Company.*

In sum, to allow the plaintiff to recover against Mobil, the jury would have to speculate that Mr. Quam headed back to the ship, fell from the barge or gangplanks, which is the only thing for which the ship would be responsible and which may have been in a negligent condition and that such fall was in some way contributed to by the condition of the barge. Such a verdict in favor of the plaintiff would constitute speculation and not inference from any probative evidence.

Plaintiff has failed to set forth the elements of a prima facie case which would allow her to present her action to

the jury. Accordingly, this final aspect of her cause of action must also be dismissed.

I have given careful consideration to the decision of the Supreme Court in *Schulz* v. *Pennsylvania Railroad Co.* and its admonition that in the Jones Act action the jury should be permitted to determine negligence and casuality by inference. If possible, in the interests of final deposition and complete review, it would be desirable to have this case go to the jury under any theory the plaintiff has established evidence that the negligence of Mobil with respect to the barge and gangplanks is in any part responsible for Mr. Quam's death. On this record at this time at least two conflicitng inferences could be drawn: (1) that, as he told his wife, Quam was going back to the ship around 7:30, that he headed back and did not make it and (2) that he returned to the ship as evidenced by the presence of his wallet and wrist watch in his room. The assertion that he would not be able to cross over the barge, as he had presumably done once before successfully in order to make the earlier call is countered by the inference that he arrived safely at least at one time. To invite the jury to choose between these inferences on this record would require speculation, not inference, that any part of Mobil's assumed negligence caused Quam's death. This situation is unlike the one existing in Schulz. The seaman reported he was going to the tugboats and changed his work clothes and proceeded with his duties. He was last seen in the direction of the tugboats. His street clothes were found in the engine room in one of the tugs, and his lunch package was there. Furthermore, plaintiff was required to be on the tugs to perform his duty. There was no question as to his presence on the tugboats. The only question was as to whether any condition on the boats caused the plaintiff's death. However, in this instance there is no evidence to place the plaintiff anywhere but at

the phone booth on the pier and possibly on the ship. Therefore, I must grant the defendants motion to dismiss the case at the close of the plaintiff's evidence for failure to establish a prima facie case and it is so ordered. Thank you very much gentlemen.

Now, I suggest that what we do is to get the jury back and I will advise them of my decision. Is there anything else, Mr. Dow?

Mr. Dow: Well, of course, your Honor, I believe you have erred, as you might suppose I would.

The Court: Yes, sir.

Mr. Dow: And I think the cases you relied upon are no longer the law. A couple of them are very old. One is not well reasoned. And consequently I must take exception, and I would ask if the stenographer will get me a copy of the record, if she can.

The Court: I understand, Mr. Dow, and I just might say it has been difficult, and I did the best I could to deal with the issues in the light of your claim, but that is what I felt I must do. Anything further, gentlemen?

Mr. Dow: Just this one thing, your Honor. I felt that to be put to the test to which we have been apparently put, one must point out the one of many holes that he fell through, the very spot of many places where there was no railing, and the bad planks, which bad plank he stepped on that might have upset him and capsized him into the water. That we cannot do. I simply thought that there was a sufficient number of them, an infinite number of such places that the presumption might be that a perfectly capable, able, sober man—and we never got to the alcohol—

The Court: That is my assumption.

Mr. Dow: —would have gotten aboard, but he failed to do so for reasons beyond his own control. I think we were entitled to that assumption, and that was our position.

The Court: I understand perfectly, sir.

Mr. Kardaras: Thank you, your Honor.

APPENDIX C

The Jones Act 46 U.S.C.A. Sec. 688, June 5, 1920 Recovery for injury to or death of Seaman

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

APPENDIX D

Federal Employers Liability Act, 45 U.S.C.A. Sec. 51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter, Apr. 22, 1908, c. 149, 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 1, 53 Stat. 1404."

IN THE

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PERTH AMBOY DRY DOCK CO.,
INTERSTATE INDUSTRIAL PROTECTION, INC.,

Respondents.

BRIEF OF RESPONDENT MOBIL OIL CORPORATION IN OPPOSITION

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BRIEF OF RESPONDENT MOBIL OIL CORPORATION IN OPPOSITION

Statement

The respondent, Mobil Oil Corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 599 F. 2d 42.

Statement of the Case

The only direct testimony supported by documentary evidence introduced at trial was from petitioner, Karin S. Quam.

The testimony and evidence at trial indicated that a personal, collect telephone call from decedent Howard Quam, first assistant engineer of SS "MOBIL CHICAGO" was received by petitioner from a telephone booth on Perth Amboy's dock some 100 feet from the vessel at 5:51 on May 3, 1976. In addition, a second telephone call was made by decedent, at approximately 7:30 P.M. In this second telephone call decedent advised petitioner that he was calling from the dock and was returning to the vessel to watch television.

There was a clear, unobstructed walking area from the phone booth to the vessel. Specifically, as one proceeded from the telephone booth there was a solid pier leading to a properly secured gangway with proper railings leading to a barge, then a clear path across the barge to the vessel's gangway, which was also properly secured and had proper railings.

Petitioner, Karin S. Quam, further testified that decedent had a peculiar habit of never leaving his home or living quarters, even for a few minutes, without wearing or carrying his watch and wallet. Decedent's watch and wallet were found in his locker on board the vessel and returned to appellant with his personal effects.

The following day, May 4, 1979, decedent's body was found nearly a mile away, in New York waters, from the location where the vessel was moored at Perth Amboy Dry Dock Company in New Jersey waters.

Remote and isolated unsafe conditions may have existed in other areas of the Perth Amboy terminal. However, there was no probative evidence whatsoever that decedent was or had reason to be in any of these remote and isolated areas.

In fact, there was not any evidence introduced at trial, as pointed out in the District Court opinion, that decedent "• • • even made it as far as Perth Amboy's dockyard

at the pier." (Sweet, J.) (See District Court opinion annexed to Petition, Appendix B, at p. 11a).

Reasons for Denying the Writ

None of the considerations governing review on certiorari set forth in Supreme Court Rule 19(b) are involved in this case.

Petitioner's Petition is without merit because the decision of the Court below involved a question of law based upon a failure of proof and the cases relied upon by petitioner herein are clearly distinguishable on their facts.

Five points are raised by petitioner in the petition for a writ. Each is answered separately herein to the extent that it involves respondent, Mobil Oil Corporation.

Response to Petitioner's Point No. I

The question presented by petitioner herein has in fact been fully answered in the very case petitioner relies upon in seeking a writ of certiorari, *Schulz* v. *Pennsylvania R. Co.*, 350 U.S. 523 (1956), wherein this Court made it clear that:

> "Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, *grounded on evidence consisting of direct statements by witnesses of proof of circumstances from which inferences can fairly be drawn.*" 350 U.S. 523 526 (emphasis supplied)

For this reason, *Schulz* v. *Pennsylvania R. Co., supra,* is even stronger authority for denying certiorari herein because in *Schulz, this Court "• • • made it abundantly clear that there must be proved facts to support the conclusion reached." Pennsylvania Railroad Company* v. *Pomeroy,* 239 F. 2d 435 at 442 (D.C. Cir. 1956) cert. den. 353 U.S. 950 (1957) (emphasis supplied).

In *Schulz,* because this Court found such underlying facts existing, their having been established at trial below, it held that the case should have been submitted to the jury, because,

> "(f)air-minded men could certainly find from the * * * facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties." 350 U.S. 523 at 526.

There was also direct evidence in *Schulz* that "(h)is (decedent's) street clothes were hanging in the upper engine room where the tug attendants usually change clothes.", 350 U.S. 523 at 524, and that his body was found in the water near the vessel.

In conclusion, by reason of all the underlying facts and evidence introduced at trial in *Schulz,* a jury could reasonably infer that on the very cold evening in question decedent Schulz could only have gone a few feet, in his underwear, in an area concededly covered with ice, when he was caused to fall to his death by reason of the negligence of the defendant or the unseaworthiness of its vessels.

Whereas in the present case it is abundantly clear, as was found by the District Court and affirmed by the Court of Appeals, *per curiam,* there was no such probative evidence introduced at trial from which a jury could reasonably draw an inference or conclusion that respondent Mobil Oil Corporation was negligent or that its vessel the SS "MOBIL CHICAGO" was unseaworthy. By permitting this case to have gone to the jury, as stated by Judge Sweet, a jury verdict in favor of plaintiff would necessarily have been the result of "* * * speculation and not inference from any probative evidence" (See District Court Opinion, annexed to Petition, at p. 13a).

Response to Petitioner's Point No. I (a)

The only direct evidence which placed decedent on the dock was the testimony that he made two personal telephone calls to petitioner, on the day previous to his demise.

His presence on the dock for purely private and personal business and in no way within the scope of his employment or in service of the vessel is far different from the situations existing in *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U.S. 36 (1943), and *Braen* v. *Pfeifer Oil Transportation Co.,* 361 U.S. 129 (1959). In *O'Donnell,* the seaman-plaintiff was ordered to go ashore by the master of the vessel to perform repair work necessary for the discharge of cargo from the vessel when the seaman was injured. Similarly, in *Braen,* the seaman-plaintiff was ordered by his supervisor to leave the vessel on which he was employed and to perform work on a nearby raft, used in servicing his employer's vessels, when he was injured.

Rather the case at bar is similar to the facts existing in *Wheeler* v. *West India S.S. Co.,* 103 F. Supp. 631, affd. 205 F. 2d 354, cert. den. 346 U.S. 889 (1953), which was cited by the District Court (Sweet, J.) in the opinion below (See Appendix B, annexed to Petition, at p. 12a).

In *Wheeler,* unsafe conditions may have existed beyond the vessel's gangway, but the trial Court nevertheless found a failure of proof, writing that:

> "* * * shipowners have generally been held not liable for unsafe conditions in places beyond the gangway not under their control when the seaman is there for his own purposes and not in the performance of his duties. Todahl v. Sudden & Christenson, supra; [5 F. 2d 462]; Walton v. Continental S.S. Co., supra [66 F. Supp. 836]; Lilly v. United States Lines Co., D.C.S.D.N.Y. 1941, 42 F. Supp. 214; see Toyo Kisen Kaisha v. Hartman 9 cir. 1918, 253 F. 422, 424." 103 F. Supp. 631, 634.

But for an even more dispositive reason petitioner s reliance upon *O'Donnell,* and *Aguilar* v. *Standard Oil Co.,* 318 U.S. 724 (1943), is misplaced. Both *O'Donnell* and *Aguilar* involved claims for maintenance and cure, which is an obligation *imposed without fault,* and clearly ". . . in no sense a function of his (vessel owner's) negligence or fault." *Aguilar,* 318 U.S. 724 at 736.

Because a vessel owner's liability to provide maintenance and cure to an injured crew member is absolute, this Court has extended such obligation to injuries occurring on shore beyond the vessel's gangway. Clearly the principles set forth in *O'Donnell* and *Aguilar* have no application whatever to the case at bar, where the question of law decided by the Court below concerned the burden of proof required to establish fault.

This was recognized by the Court in *Wheeler,* supra where it wrote that:

> "The suggestion that the Supreme Court's decisions in the *O'Donnell* and *Aguilar* cases indicate an extension of the shipowner's liability so as to include such situations was clearly rejected in *Lemon* v. *United States* D.C., 68 F. Supp. 793, 1946 A.M.C. 1640. The Court accordingly is forced to conclude that, at least as yet, it can not be held that the shipowner's liability extends to such situations." 103 F. Supp. 631 at 634.

Response to Petitioner's Point No. II

As with *Schulz* the two other cases cited in the Court of Appeals' decision, namely *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U.S. 500 (1957), and *Ferguson* v. *Moore-McCormack Lines, Inc.,* 352 U.S. 521 (1957), which appellant claims have either been misconstrued, misconceived or not understood by the Circuit Court, were not only considered but also clearly distinguished by the Second Circuit by reason of their respective facts and proofs.

The case at bar is not one where, as in *Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500 (1957) reh. den. 353 U.S. 943 (1957), there was substantial underlying proof introduced at trial which "* * * *supplied ample support for a jury finding that respondent's negligence played a part in the petitioner's injury*", which proof consisted of "* * * probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did." 350 U.S. 500 at 503 (emphasis supplied).

Nor is this a case where, as in *Ferguson* v. *Moore-McCormack Lines,* 352 U.S. 521 (1956) "* * * there was sufficient evidence to take to the jury the question whether respondent was negligent in failing to furnish petitioner with an adequate tool with which to perform his task."

Nor is this case similar to *Admiral Towing Company* v. *Woolen,* 290 F. 2d 641 (9th cir. 1961), where the issue was whether or not the undermanning of the tug boat "COMPANION" led to decedent's death and the Court of Appeals found that "* * * the trial Court * * * could well have concluded, as it actually did, that the Companion was inadequately manned", because the underlying proof and "* * * evidence showed that the Companion was a two-man vessel and that Woolen (decedent) was a seventeen year old high school student with no experience upon the open sea." 290 F. 2d 641 at 646.

Rather, in the case at bar, as stated by the Second Circuit, "*There was simply no evidence of causation.*" See Second Circuit opinion annexed to Petition, Appendix A, p. 4a (emphasis supplied).

Nowhere has a case or other authority or precedent been cited by petitioner to indicate that this Court has cast doubt upon the basic underlying principle of law that a plaintiff or his representative still has the burden of introducing

sufficient evidence on the issue of causation to warrant having his case submitted to a jury. See *Pennsylvania Railroad Company* v. *Pomeroy,* 239 F. 2d 435, 443: *"We know of no authority which rejects that principle, or suggests that appellate courts should abdicate their responsibility to see that verdicts are based on adequate evidence."* (emphasis supplied.)

Response to Petitioner's Point No. III

The question presented herein and petitioner's assertion on page 5 of the within petition that *"Schulz* v. *Pennsylvania R. Co.,* has been followed by every Court of Appeals that has dealt with the question until the case at bar arose" is misleading. This statement by petitioner implies that the *Schulz* result must be absolute in all cases. This is simply not true.

In point of fact the Second Circuit Court of Appeals following the principles of *Schulz,* determined that petitioner had failed to sustain its burden of proof.

The Second Circuit, as well as other Courts of Appeals, have distinguished *Schulz* where there was also an underlying failure of proof and in each instance where *Schulz* was so distinguished certiorari was denied by this Court. See *Swords* v. *American Sealanes, Inc.,* 443 F. 2d 1324, 1325 (4th cir. 1971), cert. den. 404 U.S. 948 (1971); *Pennsylvania Railroad Company* v. *Pomeroy,* 239 F. 2d 435, 442-443 (Cir. D.C. 1956), cert. den. 353 U.S. 950 (1957); *Smith* v. *Reinauer Oil Transport,* 256 F. 2d 646, 651 (1st cir. 1958), cert. den. 358 U.S. 889 (1958); see also *Miller* v. *Farrell Lines,* 247 F. 2d 503, 507 (2d cir. 1957), cert. den. 355 U.S. 912 (1958) and *Berke* v. *Lehigh Marine Disposal Corp.,* 435 F. 2d 1073, 1075 (2d cir. 1970), cert. den. 404 U.S. 825 (1971).

Similarly, the trial Court and Circuit Court herein followed, but distinguished the *Schulz* case on its facts, quite properly and clearly, from the instant matter.

Response to Petitioner's Point No. IV

The question presented herein is merely repeating and restating in a three line statement the questions presented in the other points.

For this reason, it is respectfully requested that reference be made to the foregoing answers in response to this point.

CONCLUSION

It is submitted that in the circumstances herein the granting of a writ of certiorari is not warranted.

Respectfully submitted,

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IN THE

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Respondents.

BRIEF FOR RESPONDENT, PERTH AMBOY DRY DOCK CO. IN OPPOSITION

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Respondents.

BRIEF FOR RESPONDENT, PERTH AMBOY DRY DOCK CO. IN OPPOSITION

Statement

The respondent, Perth Amboy Dry Dock Co., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 599 F.2d 42.

Statement of the Case

For reasons unknown to anyone but petitioner's counsel, the facts developed at the trial concerning the disappearance and death of Howard Quam were sparse. To be remembered the development and presentation of these facts at the trial was entirely within the control of counsel for petitioner.

On May 3, 1976, Mobil's vessel, the M/V MOBIL CHICAGO, was moored at Perth Amboy's facility located in the State of New York. Howard Quam was employed as assistant engineer on that vessel.

On that day, May 3, 1976, a Monday, Howard Quam made two phone calls to his wife at home. The first call was a collect call made at approximately 5:50 p.m., from a pay phone on the dock owned by Perth Amboy Dry Dock Co. The second phone call was made at 7:30 p.m. The second call was not a collect call and there was no record of it presented at the trial, except the testimony of Quam's widow. It is during the second call that Howard Quam allegedly advised his wife that he was on the dock and was going back to his room on the ship to watch television. Incredibly, the next item of evidence dealing with the facts surrounding Quam's disappearance was the Certificate of Death, which gave the place of death as Richmond County, New York, time of death—May 4, 1976, cause of death—drowing, circumstances undetermined.

At the trial, no facts were developed to show when Howard Quam was last seen alive, where, by whom, and in what physical condition he was in at that time. The only evidence developed at trial concerning the facts surrounding Quam's disappearance was testimony by the widow that Mr. Quam never went anywhere without his watch and wallet, and that Howard Quam's watch and

wallet were recovered from Mr. Quam's room on board ship and returned to her at a later date. Quam's widow further testified at trial that a bottle of librium was found in his room on board the ship, and that prior to his disappearance, Howard Quam was suffering from severe hypertension and anxiety. There was absolutely no evidence concerning why, when, where or how Howard Quam entered the water.

Petitioner, in his brief, states that Quam drowned while "returning to his ship" in an area where the Court below found "some unsafe conditions to exist in and about the dock." However, there was no proof in the case that Quam was, in fact, returning to his ship when he entered the water. As stated above, there is no proof concerning why, when, where or how Howard Quam entered the water. It was petitioner's counsel who placed into evidence the Certificate of Death, which gave the place of death as Staten Island, New York—at least one mile from the ship and the dock.

There was certainly no finding by the Trial Court that an unsafe condition did in fact exist at the dock owned by Perth Amboy Dry Dock Co.

The Trial Court merely assumed for the purposes of argument that the evidence, when considered in a light most favorable to the plaintiff, might support a jury finding that Perth Amboy was negligent. However, the Court only made that assumption for the purposes of argument in order to make its discussion of the motion complete. There was never any finding by the Court below that a negligent condition did exist. And certainly, the Court below was quick to point out that there was absolutely no proof that any condition on the vessel or the dock played any part in the disappearance of Howard Quam.

Petitioner, in his statement of facts, stated ". . . nor was anyone present on dock, barge, or ship to witness what occurred." There were persons present on the dock and there were persons present on the vessel on both May 3, 1976 and May 4, 1976. However, counsel for petitioner failed to introduce any evidence concerning their observations. This was the choice of petitioner's counsel and most probably had to do with counsel's statement on page 15a of his brief, "and we never got to the alcohol."

Reasons for Denying the Writ

A study of Rule 19 of the Supreme Court Rules shows that there are no special or important circumstances which would warrant granting a review on writ of certiorari in this case. This caes does not involve a Court of Appeals which has rendered a decision in conflict with the decision of another Court of Appeals, nor any of the other criteria set forth in Rule 19. This case deals merely with a situation where there has been a glaring failure to produce facts or evidence upon which a recovery can be made by petitioner. Both the Trial Court and the Court of Appeals for the Second Circuit analyzed the evidence in the case and rendered a decision in accordance with decisions handed down by other courts of appeals in similar situations. The only issue dealt with by the courts below in this case were questions of evidence and the apparent insufficiency of the same to carry this case to a jury.

POINT I

There was no proof of any defective condition that would give rise to a recovery.

What little evidence was presented indicates that Mr. Quam made his second phone call to his wife, returned to his room on the ship, removed his wallet and watch and thereafter entered the water and drowned.

As the Trial Court pointed out in its opinion Mr. Quam traversed the area from the ship to the phone in order to make the earlier call. In order to get from the telephone booth to the ship Howard Quam would have walked over a small portion of the dock, used a gangway with handrails to get to the floating barge, and thereafter used a second gangway with handrails to get to the ship. The record is devoid of any evidence indicating any defect on these appliances. Very few of the photographs admitted into evidence showed the condition of the aforesaid appliances. Those that did, showed them to be unobstructed and without defect. Most of the photographs introduced into evidence showed remote parts of the dock and much equipment that was obviously portable without any proof that such portable equipment was in the same place and the same condition 1½ years before, when Howard Quam disappeared. There was no proof whatsoever that remote parts of the dock shown in some photographs played any part whatsoever in this case.

The basis for the admissions of the photographs was a shaky one at best. An employee of Perth Amboy testified one year and three months after the disappearance that the pier was in approximately the same condition as it was one-year ago. At the time of this testi-

mony the photographs had not yet been taken. That deposition witness had never been confronted with the photos and asked specific questions concerning details or portable equipment shown therein. The evidence concerning the condition of the dock, floating barge and gangway between the phone booths and the ship clearly showed a safe and unobstructed walkway.

POINT II

There was no showing of any causal connection between any condition shown at the trial and Howard Quam's death.

In order for plaintiff to prevail in a case such as this, there must be some showing of a causal connection between the conditions complained of and the injury or damages. Whether one applies the classic proximate cause definition,

> An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.
>
> Federal Jury Practice and Instructions, Section 80.18.

or the more liberal definition used in Jones Act or Unseaworthiness cases,

> that the defendant's negligence caused or contributed to the injury and consequent damage sustained by the plaintiff,

> Federal Jury Practice and Instructions, Section 96.18.

one thing is certain, there must be some evidence to support a finding of causal connection.

In all of the cases cited by petitioner there is some evidence which shows a connection between the injury sustained and the alleged negligent or defective condition. In the case at bar there is no evidence whatsoever to support a causal relationship between any defective condition and the injury. This Court has seen fit to allow a jury to determine the question of liability only when there is some evidence, albeit slight, to support a finding that the injury was connected to some defect. However, this Court has never suggested that such a finding can be based on complete speculation, when the record is devoid of any evidence showing a causal connection. In *Schulz* v. *Pennsylvania R. Co.,* 350 U.S. 523, (1956), this Court made it clear that:

> Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, *grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.* 350 U.S. 523, 526 (emphasis supplied)

The cases cited by petitioner in its brief are easily distinguished from the case at bar. In all of those cases there existed some evidence connecting a party's injury with a defective condition. In the *Schulz* case there was really no question that Schulz fell from one of the tugs where his street clothes were hanging. Generally, those tugs had icy decks and insufficient light.

When recovered from the water, he was wearing nothing but shorts and socks. On the night he was last seen it was ten degrees above zero. The only inference to be drawn was that he did not travel far in that weather after removing all of his clothing. Thus, the evidence established a causal connection between the defective condition and his entry into the water. It should also be remembered that in *Schulz,* the defendant conceded that he was not under the influence of alcohol, did not commit suicide, that there was no foul play, and that he met his death by accident. There was no such concession in the case at bar.

In *Larson* v. *U.S.,* 72 F. Supp. 137 (S.D.N.Y. 1947), the question of a causal connection between the defective gangway and plaintiff's death was not in doubt. The evidence supported such a finding.

Larson's body was found on the dock directly below the head of the gangway. Death resulted from skull fractures and other trauma caused by a fall of 15 or 20 feet. Entry in the ship's log indicated "death was result of fall from top of gangway." Based on the evidence, the court concluded:

> "There seems no reasonable lurking doubt that the decedent fell from the gangway and that the gangway was an unsafe appliance."

Again, the causal connection was established.

In *Parker* v. *Seaboard Coastline Railroad,* 573 F. 2d 1004, the defective instrumentality was a railroad hopper car, but there was no question of causal connection since both decedents were found in the car partially covered by fertilizer and dead by suffocation. Once the determination was made that the car was unsafe, the causal connection was absolutely established.

The *Wiper* case, *Wiper* v. *Great Lakes Engineering Works,* 340 F. 2d 727, contains more similarities to the case at bar. Three days after his disappearance, Wiper's body was recovered in the slip where his ship had been moored. Cause of death was drowning. Negligence was conceded by the defendant. The record was completely devoid of any evidence concerning how Wiper entered the water. On that basis, the Trial Court dismissed and the Court of Appeals affirmed, finding no causal relationship between the conceded negligence and the death. The Court of Appeals was applying the law of the State of Michigan to the facts of the case—just as the law of the State of New Jersey was applied in the case at bar by the Trial Court. The dictum in the *Wiper* case indicates that had the maritime standard of causation been applied, the district court "might not" have directed a verdict. But "might not" is a long way from "would not". When considering that last proposition, it is well to remember that in *Wiper* it was reasonable to assume that Wiper entered the water at the slip since the body was found there. No assumption can be made here. The evidence shows only that the place of death was New York City, Borough of Richmond. The Certificate of Death (Exhibit No. 2) further shows that the body was "found on beach on Staten Island, circumstances undetermined." The hour of death was unknown, but the date of death was May 4, 1976, the day following the two phone calls to Mrs. Quam. So while in *Wiper* one could make an assumption of causal connection because of the place the body was found, that element is missing from the case at bar.

Even conceding that in a case such as this the causal connection need not be established as a scientific fact, there nevertheless must be *some* evidence connecting the injury and damage to the defect complained of. That causal connection is totally lacking in the instant case.

CONCLUSION

The finding of the watch and the wallet is a strong indication that plaintiff reached a seaworthy ship and somehow entered the water from it. The only evidence concerning the place of death and date of death is indictive of the fact that wherever or whenever Quam entered the water, it was at some place other than the dock or crane barge. To have submitted this case to a jury on the state of this record would have been an invitation for them to engage in pure speculation.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-443

KARIN S. QUAM, individually and as prospective Executrix of the Estate of HOWARD QUAM, deceased,

Petitioner,

—vs.—

MOBIL OIL CORPORATION,

—vs.—

PERTH AMBOY DRY DOCK CO.,

—vs.—

INTERSTATE INDUSTRIAL PROTECTION CO., INC.,

Respondents.

RESPONDENT INTERSTATE INDUSTRIAL PROTECTION CO., INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner seeks review of a judgment of dismissal for failure to make out a prima facie case, which was unanimously affirmed by the Circuit Court and a rehearing denied. Petitioner offered no proof at trial against Interstate Industrial Protection Co., Inc., and presented no argument on appeal regarding dismissal of claims against Interstate, and no question of that dismissal is raised in the present petition.

POINT I

The petition fails to show error by the courts below and in essence merely reviews evidence and discusses facts.

The petition seeks to accomplish through indirection what plaintiff failed to establish at trial or on appeal. Through a series of boldly inaccurate statements petitioner would have the Court accept as facts what were, and remain, unfounded allegations.

In "questions presented" the petition states . . . "where a seaman drowned while returning to his ship" . . . But there was no proof where or when a mishap occurred. On the contrary, the evidence was that Mr. Quam had returned to his room aboard his vessel where personal possessions he normally carried with him were found. Petitioner testified that her husband always wore his wristwatch and if he did not have it on he would have it in his pocket. Both his wristwatch and wallet were found in his room the next day.

By manipulating quotes out of context followed by conclusions not in evidence, petitioner distorts the record and

misleads the Court. No facts were established to allow even an inference that Mr. Quam went into the water while returning to his ship. According to petitioner's own testimony, at 7:30 P.M. on May 3, 1976 Mr. Quam last spoke to his wife from a telephone booth on the pier some 100 feet from his vessel MOBIL CHICAGO. He told her that he was going right back to the ship to watch television in his room. There was no proof that Mr. Quam went anyplace but back to his room aboard ship right after the 7:30 P.M. phone call and the evidence is that he did.

The so-called areas of unsafe conditions were random samplings of photos remote from the normal route to the vessel. Numerous photographs were presented to both trial and appellate courts and the only two relevant ones show the access route to be normal and unobstructed. If anything they prove safe access to and from the ship. There was no claim of insufficient lighting and moreover Mr. Quam had crossed the same area earlier that day when he made a 5:50 P.M. phone call to his wife.

If any inference is to be drawn, the only valid one is that Mr. Quam made it safely back to his quarters and what happened thereafter can only be guessed. Evidence of a return to quarters renders moot claims of negligence or breach of warranty in places remote from the route to the ship. Decedent's movements between the time of his return to his stateroom and discovery of his body a mile up river off Staten Island the next afternoon are conjectural. Whether he fell or jumped from the MOBIL CHICAGO, or was a victim of foul play, is guesswork, but it is clear that petitioner did not sustain the burden of connecting death to negligence or breach of warranty.

The statement at Page 13 of the petition that both courts below found that safe passage was not given is

false. Alleged conditions of the pier, isolated from the route to the ship, were not proof of the condition of the area that lay between the phone booth from which decedent called his wife at 7:30 P.M. and the ship's gangway, depicted in two photographs as wide, clear walking areas down the center of the pier, and a clear open area on the car float leading to the ship's gangway. The wide ramp from pier to float was guarded by rails as was the gangway from float to ship.

The trial court stating that there is evidence for the jury to conclude that Perth Amboy was negligent was not a finding of negligence in any way related to the casualty, for in fact there was no such evidence. The Court went on to say that even assuming that negligent conditions existed, there is no evidence upon which the jury could conclude that such negligence was the proximate cause of the injury.

The essential elements of a prima facie case were absent because there was no proof that conditions complained of played any part, even the slightest, in causing the death. As the Second Circuit said, "*There was simply no evidence of causation.*" The essential elements must be proved. *Prosser on Torts,* 4th Ed. 1971, P. 241; *Norris, The Law of Seamen,* 3rd Ed., S. 693, P. 406; *Blier* v. *U.S. Lines,* 286 F.2d 920, 925 (2 Cir. 1961), cert. den. 368 U.S. 836. Pointing to isolated areas and labeling them poorly maintained does not connect a chain of events leading to the casualty. The Courts below studied the evidence on that point and found it inadequate.

Since the requisite connection of negligence to the casualty was missing, the trial Court's decision should not be disturbed unless clearly erroneous. *McAllister* v. *U. S.,* 348 U. S. 19 (1954).

The cases cited by petitioner are distinguishable on their own facts. In each one there were specific findings (or concessions, as in *Schulz* v. *Penn R. Co.,* 350 U.S. 523) of negligence or unseaworthy conditions, and evidence of the whereabouts of decedents placing them in proximity to those conditions prior to the casualty, so that cause and effect might be susceptible to a reasonable inference. In the present case no link was ever made between a negligent or unseaworthy condition and a resulting death. It never appeared that the death was the natural and probable consequence of a wrongful act or condition.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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HEALEY & MCCAFFREY
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